No. [redacted]

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964.

ELSE WILLHEIM and RANDOLPH PHILLIPS,

Petitioners,

v.

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners d/b/a MURCHISON BROTHERS; and INVESTORS DIVERSIFIED SERVICES, INC.,

Respondents,

INVESTORS MUTUAL, INC.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

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INDEX.

	PAGE
Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	5
Statement of the Case	5
The Admitted Ultimate Facts	6
The Statute as read by Petitioners and as rejected by the decision below	8
The S. E. C.'s 4 to 1 vote in favor of petitioners' statutory construction	9
Reasons for Granting the Writ	10
I. The erroneous "colloquial sense" reasoning	16
The omitted legislative history	17
The second sentence of Section 2(a)(9) makes clear the lower Court's erroneous reasoning and shows that the Murchisons' $32,000,000 Alleghany stock purchases excluded their transactions from the "sole" exception specified by Congress to a statutory "transfer" of "control or management"	23
The basic error of the Court below	24
II. The construction of the Act by the Court below mistakes the "remedial purpose" of the Act and "the mischief and defect" aimed at by Congress	28

PAGE

III. The decision herein of the Court of Appeals for the Second Circuit creates a "loophole" in the Declaration of Policy in Section 1(b)(6), pursuant to which Congress directed that the Investment Company Act of 1940 "shall be interpreted", in conflict with the "no loophole" construction of the Court of Appeals for the Ninth Circuit in S. E. C. *v.* Insurance Securities, Inc., 254 F. 2d 642, cert. denied, 358 U. S. 823 (1958), and the Senate and House reports 29

Conclusion 34

Appendix "A"—The Statute A-1

Appendix "B"— Opinion and Judgment below B-1

Table of Cases.

	PAGE
Brown v. *Bullock*, 294 F. 2d 415 (2d Cir. 1961)	21
Brown v. *Bullock*, 194 F. Supp.	25
Commercial Discount Co. v. *Cowen*, 116 P. 2d 599 (Calif. 1941)	22
Commissioner v. *Sternberger Estate*, 348 U. S. 187	21
Electric Bond & Share Co. v. *S.E.C.*, 303 U. S. 419	30
Rayonier Incorporated v. *United States*, 352 U. S. 317	24
Sanford v. *Commissioner*, 308 U. S. 39	22
S.E.C. v. *Capital Gains Research Bureau, Inc.*, 84 S. Ct. 273 (1963)	12, 16
S.E.C. v. *Insurance Sec., Inc.*, 254 F. 2d 642 (9 Cir.), cert. denied, 358 U. S. 823 (1958)	20, 31
S.E.C. v. *Joiner Corp.*, 320 U. S. 344	29, 30
United States v. *Rosenblum Truck Lines*, 350 U. S. 50	21

Legislative Sources.

Congressional Record, June 26, 1964	10
Senate Hearings on S. 3580, 76th Cong., 3d Sess. (1940)	18
Senate Report No. 1775 on S. 4108, 76th Cong., 3d Sess., 1940	13
Senate Report No. 25, Part 27, 76th Cong., 3d Sess. (1940) *"Alleghany System—Acquisition of Control by Robert R. Young"*, pp. 1, 3	14
SEC Report to Congress on Investment Trusts and Investment Companies	19

Miscellaneous.

63 Columbia Law Review 733 (April 1963). *"Termination of Management Contracts Under the Investment Company Act of 1940,"* at p. 744	11, 26, 27
45 Virginia Law Review 1203 (1959) *"Investment Company Act: Advisory Contracts"*	21

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INVESTORS MUTUAL, INC.,

Defendant.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT.

Petitioners pray that a writ of certiorari issue to review a judgment of the United States Court of Appeals for the Second Circuit affirming a final judgment of the United States District Court for the Southern District of New York dismissing the complaint herein.

Opinions Below.

The opinion of the District Court (3a)[1] is reported at 231 F. Supp. 142 (1964), and the opinion of the Court of Appeals (18d and Appendix B, *infra*) is reported at 342 F. 2d 33 (1965).

Jurisdiction.

The judgment of the Court of Appeals was dated and entered on February 10, 1965, Appendix B, *infra*, B-1. Jurisdiction of this Court is invoked under Section 1254(1) of the Judicial Code. 28 USCA 1254(1).

Questions Presented.

Congress in Section 1(b), the Declaration of Policy, of the Investment Company Act of 1940 [15 USCA 80a-1(b)], declared that "the national public interest and the interest of investors are adversely affected— * * * (6) when . . . the control or management (of investment companies) is transferred, without the consent of their security holders." It directed that "the provisions of this title shall be interpreted . . . to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors."

Section 2(a)(4) states "'Assignment' includes *any* direct or *indirect* transfer * * * of a controlling block of the

[1] Citation by a numeral followed by a letter is to the appendix to the briefs or to the reply brief in the Court of Appeals as certified by the Clerk of the Court of Appeals for the Second Circuit. Nine additional copies of the appendices to appellants' and appellees' briefs below are being filed with this petition. A citation preceded by the letter R. is to the unprinted certified record below.

assignor's voting securities by a security holder of the assignor'' (the investment company's investment adviser). The following questions are presented:

1. Which application of the Congressional Declaration of Policy to the ''assignment'' sections [15 USC §80a-2(a)(4); 15(a)(4), (b)(2)] is correct:

(a) the S.E.C.'s original construction, adopted by a 4 to 1 vote, then abandoned by a 3 to 2 vote, that where a holding company (Alleghany) controlled an investment company advisor and distributor (Investors Diversified Services, Inc.) by reason of ownership of ''a controlling block'' (47.6%) of the latter's stock, ''a change of control'' of the holding company ''as the result of a proxy contest would effect an assignment of the advisory and distributing contracts'' with the underlying investment company (Investors Mutual, Inc.) at the bottom of the pyramid; or

(b) the construction adopted by the Court of Appeals for the Second Circuit that an ''assignment'' did not occur when the ''change of control'' (from nominees of Allan P. Kirby to those of John D. Murchison) of the 47.6% ''controlling block'' resulted from direct purchases by Clint W., Jr. and John D. Murchison of 22% of the Alleghany common stock (for $27,000,000), purchases by their associates of another 7% (for $5,000,000), plus proxies for another 21% obtained by the Murchisons at a soliciting cost of $500,000 in an Alleghany proxy contest ''featured by enormous stock purchases by both sides''?

2. Did Congress intend in Sections 1(b)(6) and 2(a)(4) of the Investment Company Act that, as asserted by petitioners and the S.E.C. Division of Corporate Regulation and upheld by the S.E.C.'s original 4 to 1 vote, there be

no distinction between "the effect of a transfer of control through exercise of the power to sell a security or the excise of the power to vote a security, since both are incidents of ownership"?

3. Was it error to construe the definition of "assignment" in 15 USCA 80a-2(a)(4)—"any direct or indirect transfer . . . of a controlling block of the assignor's (investment adviser's) voting securities by a security holder" of the investment adviser—so as to exclude the interpretation

> "any direct or indirect transfer . . . of a controlling block" of the investment adviser's voting securities "by a security holder" (Alleghany Corporation) from "the control or management" [15 USCA 80a-1(b)(6)] of the Kirby Group to that of the Murchison Group pursuant to the legal compulsion of the latter as stockholders and proxy holders?

4. Where Congress has explicitly identified the transactions constituting a transfer of "control or management" of an investment adviser which it did not intend to constitute an "assignment" did the Court below have the power to create an additional exemption of a transfer of control and management resulting from combining multi-million dollar stock purchases with a solicitation in a proxy contest?

5. Because the legislative history of the Investment Company Act of 1940 did not contain an example of a transfer of control or management of a holding company owning "a controlling block" of an investment adviser where the new control or management was achieved by stock purchases combined with a proxy contest—there having been no proxy contest for control of such a holding company until 20-years after the Act's enactment—did the

Court of Appeals have the power to exclude such a transfer of control or management from the operation of the Congressional Declaration of Policy in Section 2(a)(4) on the speculation that had Congress known of such a transaction it would have exempted it?

6. Did the Court of Appeals correctly construe the statutory terms "any direct or indirect transfer of a contract . . . or of a controlling block"?

Statute Involved.

The statute involved is the Investment Company Act of 1940, 15 USCA 80a et seq. Its pertinent provisions are printed in Appendix A, *infra.*

Statement of the Case.

The Court below affirmed a final judgment (11a) of the District Court pursuant to an opinion by Judge Dawson dated June 23, 1964 (2a) granting motions for summary judgment dismissing a complaint for an injunction and an accounting based on the alleged illegal performance of two contracts, each dated April 6, 1960 (R. 497; R. 501), pursuant to which respondent Investors Diversified Services, Inc. (hereinafter "IDS") performed investment advisory services and acted as principal underwriter on behalf of defendant Investors Mutual, Inc.[2]

Petitioners bring this action both in their own right and derivatively as stockholders of Investors Mutual, Inc., a registered investment company with the Securities and

[2] On March 20, 1962, while a motion for preliminary injunction was pending, the contracts which were due to expire on April 6, 1962, were extended by board action. (R. 1181) They were continuously performed until April 6, 1963 (R. 1181-1182) when new contracts not at issue herein were approved by the shareholders of Investors Mutual.

Exchange Commission under the Investment Company Act of 1940. (15 U. S. C. A. §80a *et seq.*) The complaint alleges that the contracts were "assigned" within the meaning of Sections 15(a)(4) and (b)(2) of the Investment Company Act, resulting in "automatic termination" as a result of the acquisition by the defendants Murchison of control of Alleghany Corporation (which controls Investors Diversified Services) on May 23, 1961.

The Admitted Ultimate Facts.*

1. Alleghany Corporation, as of April 6, 1960 and continuously thereafter owned 47.6% of the common (voting) stock of IDS and thus at all relevant times controlled IDS in fact and within the meaning of Section 2(a)(9). (R. 54, 3a)

2. IDS, as of May 23, 1961, was the investment adviser, investment manager and principal underwriter for Investors Mutual, Inc., pursuant to contracts dated April 6, 1960, and continuously performed these contracts until April 6, 1963. (R. 1181-2) By virtue of these functions, IDS exercised "control or management" within the meaning of Section 1(b)(6) of Investors Mutual, Inc., a registered management investment company (47a-49a, 3d-7d).

3. Section 15(a) of the Act makes it unlawful for any person to serve or act as investment adviser of a registered investment company, except pursuant to a written contract which "(4) provides, in substance, for its automatic termination in the event of its assignment by the investment adviser." Section 15(b)(2) has a similar requirement with respect to the underwriting contract and its assignment by the underwriter. The investment advisory and underwriting contracts, both dated April 6, 1960 herein, between IDS

* See Appendix B, B-3, 4, 5, 8-10.

and Investors Mutual, both included a provision pursuant to this statutory requirement stating that—

> "In the event of the assigning of this contract by Investors (Diversified Services, Inc.) it shall be considered terminated as of the date of such assignment." (R. 499)

4. The S. E. C., IDS and Investors Mutual on 3 different occasions, in 1949, 1955, and 1960 concurred in treating the transfer of control of IDS as the statutory transfer of the "control or management" of Investors Mutual, and therefore as the "assignment" contemplated by the Act. (12a-15a)

5. On May 23, 1961, after the expenditure of more than $27,000,000 for the purchase of roundly 22% of Alleghany's common stock by John D. and Clint W. Murchison, Jr. directly and through their majority-owned companies, at least another $5,000,000 expended by 13 of their associates for an additional 7% (20a-31a), the additional expenditure by the Murchisons of some $500,000 in soliciting proxies for another 21% gained by representations of future improved management of Alleghany and IDS made in connection therewith, John D. Murchison and his nominees acquired board and management control of Alleghany and ousted therefrom Allan P. Kirby and his nominees despite the latter's ownership of 33% of the common stock. (4a)

6. On July 18, 1961, Alleghany under the new Murchison control caused to be held a special meeting of IDS shareholders at which John D. Murchison, who had become President and Chief Executive Officer of Alleghany (44a), executed Alleghany's proxy for 47.6% of the common (voting) stock of IDS for election of 7 new IDS directors to replace 7 of the 9 nominated by Allan P. Kirby when Alle-

ghany was under his control. (44a-45a) At the same time the board was increased to 10 members so that Murchison nominees acquired 8 of the 10 seats, and Clint W. Murchison, Jr. became Chairman. (R. 79)

7. The "consent" of Investors Mutual's 325,000 "security holders" [Sec. 1(b)(6)] was at no time between May 23, 1961 and April 5, 1963 obtained to either of these "transfers" of "control or management" of Alleghany or IDS. Indeed no disclosure of these "transfers" of "control or management" were made to them until they received a Prospectus Supplement dated July 19, 1961 (R. 75, 119); and no opportunity thereafter was given to them to vote for new contracts until April 6, 1963. (46a) This occurred after the Murchisons had contracted to sell-out for $10 per share, a "premium" of more than $2.00 a share over and above the market price of the shares on August 14, 1962 when the purchase price was fixed, 3,000,000 to 3,500,000 shares of Alleghany common stock held by the Murchisons and their friends (41a, 46a-47a) (R. 1234-Exhibit "A" thereto at pp. 27-28 and 51). Thus the Murchisons used their control of Alleghany, IDS and Investors Mutual to obtain a $6 to $7 million dollar "premium" for themselves and associates before Mutual's 325,000 shareholders were accorded their statutory right under Sec. 1(b)(6) and 15(a)(4) to vote for a new investment advisory contract.

The Statute as read by Petitioners and as rejected by the decision below.

The Court of Appeals affirmed the decision of the District Court dismissing the complaint on the basic ground that Congress did not intend that an "assignment" of investment company service contracts would be effected by

a "change of control" of an investment adviser as a result of a proxy contest. It thus rejected petitioners' contention that the language "transfer" of "control or management" of Section 1(b)(6), the Policy Section of the Act, by which it "shall be interpreted", had to be read into the definition of "assignment" in Section 2(a)(4). Thus interpreted Section 2(a)(4) reads: "'Assignment' includes any direct or indirect transfer (of the control or management) . . . of a controlling block of the assignor's (investment adviser's) voting securities by a security holder" (Alleghany) of the investment adviser. Here the "controlling block" is the 47.6% IDS voting block, the "control or management" of which was transferred by Alleghany from the Kirby nominees to the Murchison nominees pursuant to the latter's legal compulsion as stockholders and proxy holders. The Court below stated that "Although we consider the case closer than (Judge Dawson) did, we affirm." But it acknowledged that "The serious questions are whether there was an 'indirect transfer', either of a 'controlling block' or of the contracts themselves." (Appendix B, B-6).

The S. E. C.'s 4 to 1 vote in favor of petitioners' statutory construction.

Prior to authorizing a filing of an *amicus curiae* brief in this Court on the appeal for preliminary injunction, the S. E. C. by a vote of 4 to 1 upheld the position advocated by its Division of Corporate Regulation, which administers the Investment Company Act

> "That a change of control of a corporation (Alleghany) which controlled a corporate adviser or distributor, (IDS) whether by transfer or as the result of a proxy contest would effect an assignment

> of the advisory and distributing contracts. * * * That * * * the definition ("assignment") could and should be read to include * * * a change of control and thus a change in the identity of the adviser, since it was the purpose of the act to enable stockholders to approve or disapprove of a new adviser. * * * that no distinction was intended by Congress by the effect of a transfer of control through exercise of the power to sell a security or the exercise of the power to vote a security, since both are incidents of ownership."
>
> (*Congressional Record*—Senate, June 26, 1964, p. 14729)

The Commission by a vote of 4 to 1 authorized the Amicus Curiae brief in the Court of Appeals to urge adoption by the court of the position advanced by the Division. Upon subsequent reconsideration, however, the Commission by a vote of 3 to 2 determined not to include this argument. (*Id.*) Petitioners urge this Court to adopt the construction adhered to by the dissenting Commissioners.

Reasons for Granting the Writ.

The Court below in construing the scope of the Congressional Declaration of Policy [15 U.S.C.A. 80a-1(b)(6)] and "assignment" sections [15 U.S.C.A. 80a-2(a)(4), 15(a)(4), 15(b)(2), and 15(d)] of the Investment Company Act of 1940 has

1. Decided important questions of federal law that have split the S. E. C. 4 to 1 in petitioners' favor and then 3 to 2 against expressing to the Court below the position in favor of petitioners' construction adopted by the S.E.C.'s own investment company Division in

charge of administering the Act. These questions characterized by the Court of Appeals as "serious" have not been but should be decided by this Court because they determine the right of some 800,000 small security holders in at least 5 investment companies in the Alleghany holding company system originally controlled by Kirby and then by the Murchisons, to refunds of the profits made on the illegally performed contracts. *Investors Diversified Services, Inc.*, 30 S. E. C. 273, 274 (1949); and they affect pending administrative determinations before the S.E.C. under the Act.

2. In *Termination of Management Contracts under the Investment Company Act of 1940*, 63 Columbia Law Review 733 (1963), upholding the construction of petitioners herein, the commentator states: "The concept of corporate control, described (by Berle) as 'the most important single fact' in the American corporate system" is at issue herein (pp. 24-26, *infra*). The Court below stated, "The concept of control is relevant to a number of provisions in the Investment Company Act . . ." (Appendix B, B-10). The Estate of Robert R. Young sold to the Murchisons for a $4,870,991 "premium" over market a block of Alleghany stock that was converted in April, 1961, the eve of the proxy contest, into 1,004,221 common shares or 11% of the voting power over the 47.6% IDS "controlling block". The transfer and conversion of this crucial block was never disclosed to the shareholders of Investors Mutual. It admittedly provided the Murchisons (who won by only 854,000 votes) with the margin of victory, but the Court below held it was not "a 'controlling block' but a block enormously valuable and even *necessary* for a successful challenge to Kirby's control." (Emphasis

supplied) (Appendix B, B-3, 4, 5, 9-12). Thus it was admittedly the balance of power, the detachment of which from Kirby, for whom it had been voted in prior years, cost him the victory and attracted the opposing proxies. The statute, furthermore, speaks of "a controlling block", not "the controlling block", and not 2 controlling blocks (here of both Alleghany and IDS). Thus the interpretation of the Court below will have an impact upon all the federal securities laws since "control" issues are common to them.

3. The Court below has not applied to the issues herein the rule of construction enforced by this Court in *S.E.C.* v. *Capital Gains Research Bureau, Inc.*, 84 S.Ct. 273 (1963) that the Investment Advisers Act of 1940 and this companion 1940 statute are to be construed "not technically and restrictively, but rather flexibly to effectuate (their) remedial purposes".

4. The "remedial purpose" of the "assignment" provisions of the Act was to terminate automatically the advisory contracts whenever there was a "change" of the investment adviser's "control" or management, according to the S.E.C.'s Chief Counsel in explaining the draft act to Congress and the industry.* Only a statutory vote by the investment company's security holders, after such termination, can reinstate the contract. [Section 15(a)] These protective provisions for investment company government by consent of the governed "security holders" are now modified by the Court below, which in effect holds that where the control is changed at the top by a proxy contest between giant contesting factions there is no need to obtain the "consent" of the 325,000 underlying investment

* See pp. 17-20, *infra*.

company "security holders". Thus "democracy" at the top (in a proxy contest where two contesting multi-millionaire groups spent more than $60,000,000 to purchase 60% of the voting stock) eliminates the need for democracy below—an interpretation in violation of the fundamental policy of the Investment Company Act, and The Securities Exchange Act of 1934. Such an interpretation is especially inappropriate since the S.E.C. condemned Alleghany Corporation at the time of the acts herein as a holding company "pyramid" that violated the Congressional standards in Section 1(b)(4) of the Investment Company Act of 1940 by its "inequitable" and "unduly concentrated" voting control over its investment company system. *In the Matter of Investors Diversified Services, Inc.*, 40 S.E.C. 1107, 1109-1110. (1962).

5. The Court below, in eliminating "transfers of control" by proxy contest from the scope of the Investment Company Act's "assignment" Section, has created a "loophole" in the Congressional Declaration of Policy, pursuant to which Congress declared the Act "shall be interpreted", in conflict with the "no loophole" construction of the Court of Appeals for the Ninth Circuit (*S.E.C.* v. *Insurance Securities, Inc.*, 254 F. 2d 642, 648-650), and the Senate and House Reports. Furthermore this "loophole" is contra-indicated by Congress in Senate Report 1775, 76th Cong., 3rd Sess. on the Act, which states with reference to "Management Investment Companies":

> "By various devices of control, such as * * * *control of the proxy machinery,* and *pyramiding of companies,* public investors are effectively denied, in many instances, any real participation in the manage-

ment of their companies." (p. 7) (Emphasis supplied)

Alleghany is a classic and notorious example of "pyramiding", constituting as it does a holding company on top of an investment advisory and underwriting company on top of open-end mutual fund companies. On top of this triple-tiered pyramid first sat on a fourth tier Robert R. Young (1937-January, 1958), then his partner Allan P. Kirby (Feb., 1958-May, 1961) and then John D. Murchison and his partner Clint W. Murchison, Jr. (May, 1961-Oct., 1962). In view of the Senate's explicit condemnation of the "devices" of "control of the proxy machinery" and "pyramiding" and "transfers" of "control or management" of investment companies "without the consent of their security holders" "however achieved" (254 F. 2d at 648), it is a total distortion of the Congressional purpose to legalize and exempt from the operation of the "assignment" sections of the Act the admitted "transfer of control of Alleghany" and thus of IDS and Investors Mutual found here because it was achieved *in part* by a proxy contest. See Senate Report No. 25, Part 27, 76th Cong., 3d Sess. (1940) *"Alleghany System—Acquisition of Control by Robert R. Young"*, p. 1, and Chairman Wheeler's reference to a $3 billion empire being "tossed around like a toy balloon". (p. 20) In October 1962 after the May, 1962 stock market "break" the Murchisons sold Alleghany "control" to Gamble-Skogmo, Inc. and in October, 1963 the Gamble interests sold back "control" to Kirby. See 1963 ANNUAL REPORT OF ALLEGHANY CORPORATION TO S.E.C., notice of Dec. 4, 1963 Annual Meeting and Proxy Statement dated Nov. 7, 1963, p. 5. Thus more than 20-years later "control" continued to be "tossed around like a toy balloon". The "national public interest" pursuant to which The Investment Company Act was enacted thus re-

quires an effective and not loose application of the statute to the facts shown herein.

6. Congress explicitly identified in the exemption sections of the Act the transactions that were not to be included in its scope. [§§2(a)(4) and 2(a)(9)] Transfers of control or management of an investment company adviser and manager achieved by a combination of multi-million dollar stock purchases and proxy solicitations are not included in the exempted transactions; yet the Court below by inferential reasoning and no specific or identified statement in the legislative history found such an exemption was within the intention of Congress, and imposed on petitioners the burden of proving to the contrary.

7. The admitted facts, as found by the Court below, both explicitly and literally come within the scope of the definition of "assignment" in Section 2(a)(4) when the words "transfer . . . of a controlling block" are read to include the meaning derived from the Policy Section statement [15 U.S.C. 80a-1(b)(6)], by which Section 2(a)(4) "shall be interpreted", of "transfer of the control or management . . . of a controlling block". Yet the Court below exempted the transactions herein from the scope of the Act on the speculation that had Congress had an illustration before it of such a "transfer" achieved in part by a proxy contest it would have exempted and did intend to exempt such a transaction from the statute's "remedial purposes."

8. The astonishingly excessive profits in a regulated industry made by the Murchisons and Alleghany out of their fiduciary relationships with Investors Mutual and its 4 associated mutual fund companies call for the strictest scrutiny by the Courts in inter-

preting this statute which was enacted in "the national public interest and the interest of investors". Here the record shows that at the end of 1961 following their successful proxy contest the two Murchison Brothers (John D. and Clint W., Jr.) had a capital gain of $45,000,000, or a rise of more than 900% on a less than $4,200,000 investment made in December 1953 in their IDS shareholdings (13a). Alleghany Corporation, as of the end of 1961, had a capital gain of some $102,000,000, or a rise of more than 5000% on a less than $2,000,000 original investment made in 1949 in its IDS shareholdings (37a). The major portion of these profits was recorded after there had been no less than 3 statutory "assignments" of the mutual fund contracts in 1949, 1955 and 1960, (12a-15a), not counting the 1961 acts at issue herein. These facts show the importance of this Court's canon that the Investment Advisors Act of 1940 and this companion statute are to be construed "not technically and restrictively, but rather flexibly to effectuate its remedial purposes." (*S. E. C.* v. *Capital Gains Research Bur., Inc.*, 84 S. Ct. 275 (1963).)

I.

The erroneous "colloquial sense" reasoning.

According to the Court below

> "* * *. Appellants properly stress the direction, in §1 of the Investment Company Act, that its provisions shall be interpreted so as "to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors," one of which, §1(b)(6), is "when the control or management . . . [of investment companies] is trans-

ferred, without the consent of their security holders." In a colloquial sense it may be true that the result of the Alleghany proxy contest "transferred" the "management" not merely of IDS but also of an investment company, to wit, Investors Mutual, without the consent of the latter's stockholders, and, correspondingly, appellants would have us read the terms "indirect transfer . . . of a contract" in §2(a)(4) to extend to every change of "control or management" of an investment adviser. * * * ." (Appendix B, B-14)

To say that the facts herein showed that the "management" of IDS, the investment adviser, was only transferred "in a colloquial sense" is to omit that it was transferred also in the legal sense of the word. What is colloquial about a "transfer" of "management" achieved, as here, by vote of the 47.6% block of IDS voting securities which the Murchisons, following their legal capture of Alleghany's control on May 23, 1961, effected on July 18, 1961 when at a special meeting of IDS stockholders they replaced 8 of the Kirby nominees with 8 Murchison nominees on the 10-member board of IDS? How else is management legally "transferred"?

The omitted legislative history.

The Court below further stated that

> "* * * But we find it hard to read so broadly terms that Congress appears to have chosen with care, especially when nothing could have been simpler than to specify that any change of "control or management" of an adviser constituted a transfer. We surely should not do this without firm evidence that Congress considered events like the Alleghany proxy contest as abuses to be remedied by the automatic termination provisions."

But as we show hereafter the Congressional record shows that "change of control" was in fact the intended meaning and all "changes of control" except those explicitly exempted in the statute were to result in an "assignment".

David Schenker, Esq., the Chief Counsel for the S. E. C. at the Congressional hearings on the Investment Company Act, the S. E. C. itself and Alfred Jaretzki, Jr., Esq., one of the major spokesmen for the industry, all used the general language "change in control" or "shift in control" as a meaning of the word "transfer". Even defendant IDS and Investors Mutual in soliciting proxies 15 years later for the renewal of the 1955 investment advisory contract stated:

> "Under the terms of the Federal Investment Company Act of 1940, an assignment takes place with the change of control of the investment adviser." (R. 1237) (Emphasis supplied)*

That Congress had the investment management personnel directly in mind when it wrote Section 1(b)(6) and Section 15(a)(4) is also made clear by the statement of Chief S. E. C. Counsel Schenker to the Senate Banking & Currency Committee with respect to Section 15:

> "The fourth provision [Sec. 15(a)(4)] is that you cannot assign the contract. * * * This provision says that the management contract is personal, that it cannot be assigned, and that you cannot turn over the management of other people's money to someone else." [Senate Hearings on S. 3580, 76th Cong., 3d Sess. (1940), p. 253].

* The record citation is to the unprinted record certified to the Court of Appeals.

Mr. Schenker stated in explaining the S. E. C. draft bill to the industry spokesmen who, by a memorandum insertion, put his explanation in the Senate record:

> "It (the management contract) shall be terminated automatically if the control of the company changes." "*Investment Trusts and Investment Companies,*" Hearings before a Subcommittee of Senate Committee on Banking & Currency, 76th Cong., 3d Sess. on S. 3580, April 12, 1940, Part 2, p. 403.

At this stage of the legislative history there was no definition of "assignment" as used in Section 15 of the draft bill (S. 3580), and no reference to transfer of a controlling block. There was however the Policy declaration condemning all acts by which "the control or management" of investment companies was "transferred without the consent of their security holders."

Thus it is clear from Mr. Schenker's statement that the S.E.C. intended both "assignment" and "transferred" to have the meaning stated in the explanation to the industry representatives above-quoted of "change of control" of the investment adviser, the very phrase for which the Court below could find no support in the legislative record.

In no part of the subsequent discussion by industry or other representatives was this definition challenged. Section 1(b) and subparagraph (6), then Section 2 and subparagraph (6) of the draft bill, remained unchanged in the enacted bill from S. 3580, but present Section 2(a)(4) was added. Section 2(a) now declares that "When used in this title, unless the context otherwise requires— • • • "(4) 'Assignment' includes, etc.'"* The use of "includes"

* "The word 'includes' is usually a term of enlargement. As stated in Federal Land Bank of St. Paul v. Bismarck Lumber Co., 314 U. S. 95, 100 • • • 'including' is not one of all-embracing definition, but connotes simply an illustrative ap-

shows it was not meant to "exclude" the original intended meaning of "assignment" as explained by Mr. Schenker to be "if the control of the company changes". Thus the addition of the words "any direct or indirect transfer * * * of a contract * * * or of a controlling block" were obviously inserted to close a "loophole", not to open one. Finally, the words "unless the context otherwise requires" makes clear that the "context" of the Section 15 usage of "assignment" is the Policy Declaration condemning the act "when the control or management (of investment companies) is transferred without their security holders consent". This "context" was not disturbed by the addition of Section 2(a)(4), and was intended to mean and does mean as shown by the authorities above and hereafter cited "change of control" or "shift of control" of the investment adviser "however achieved" (p. 16, *supra*).

The Court of Appeals for the 9th Circuit in *S. E. C.* v. *Insurance Shares, Inc.*, 254 F. 2d 642, made this unmistakably clear:

> "[10] The fiduciary relationship which the service company, including its directors and leading stockholders, occupied with regard to Trust Fund arose by virtue of the service contracts. The *shift in the control* of the service company did not, and could not, effectuate a transfer or sale of these service contracts. Quite to the contrary, and by operation of §15(a)(4) of the act, this *shift in control* automatically terminated the service contracts" (p. 650) (emphasis supplied).

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plication of the general principle." *U. S.* v. *Gertz*, 9 Cir., 249 F. 2d 662, 666.

See Appendix "B" of appellants' appendix at record pp. 50a to 54a for an analysis by the S. E. C. Division of Corporate Regulation entitled "Section 2(a)(4) by its Terms Does not Limit 'Assignment' to Those Situations Specifically Mentioned Therein."

This was true, the court stressed, when there was "a shift in control" "*however achieved*" (254 F. 2d at 648).

Alfred Jaretzki, Esq., of Sullivan & Cromwell, one of the chief industry spokesmen at the Congressional hearings (see *Brown* v. *Bullock*, 194 F. Supp. at pp. 241-2) also has confirmed "the change of control" meaning of "transfer" in 45 Virginia Law Review 1203 (1959) "*Investment Company Act: Advisory Contracts*":

> "The Investment Company Act deals with the problem of the transfer of control of investment advisory companies. It was aimed to prevent the investment company from being bound without its consent to an advisory company under changed control."

The S. E. C. Report on "*Investment Trusts and Investment Companies*" (1939-1940), which constituted the basic foundation of the Act's legislative history, states:

> "Control of investment companies' funds were shifted to new managers without the consent of public stockholders and in many cases without their prior knowledge. * * * Nevertheless, without the prior knowledge or consent of the stockholders, shifts in the management personnel and in the investment policies of investment companies were of frequent occurrence." (Part III, pp. 1024-1025)
> "* * * no independent body existed with authority to supervise, regulate or pass upon the fairness of changes in control . . ." (pp. 1029-1030) (Emphasis supplied)

The Courts have given the same meaning, among others, to "transfer".*

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* "Words are even denied their literal meaning if to accept them literally would produce a result at variance with the legislative policy and purpose." *United States* v. *Rosenblum Truck Lines*, 350 U. S. 50, 55-56; *Commissioner* v. *Sternberger Estate*, 348 U. S. 187, 206.

> "in its ordinary use it (transfer) has a very general meaning, including the . . . changing of its (a thing's) control or possession." *Commercial Discount Co.* v. *Cowen,* 116 P. 2d 599, 602 (Calif. 1941).
>
> "the essence of transfer is the passage of control over the economic benefits of property rather than any technical change in its title". *Sanford* v. *Commissioner,* 308 U. S. 39, 42-43.

87 *Corpus Juris Secundum* states:

> "TRANSFER. It has been said that the word 'transfer' is one of the widest terms that can be used, and that in ordinary use and language it has a very general meaning and applies either to the removal of a thing or rights from one place or person to another, the *changing of the control* or possession of things, or to the conveyance of title." (p. 892) (citing cases) (Our emphasis).

Congress by using *"any"* and *"indirect"* obviously intended to include all kinds of "transfer" known to the law. Thus the District Court's finding that there had been a "transfer of control of Alleghany" (5a, 7a, 8a), makes compulsory under the mandate of Section 1 (b) and 1 (b)(6) the construction of Section 2(a)(4) so that:

> " 'Assignment' includes any direct or indirect transfer or change in control of * * * a contract * * * or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor . . ."

It is undeniable that there was a "change in control" of IDS and of its investment advisory and underwriting contracts from Allan P. Kirby and his nominees to John D. Murchison and his nominees. These are precisely the kind of "shifts in the management personnel" mentioned by

the S. E. C. Chief Counsel Schenker and in the above-quoted S. E. C. Report.*

It is also undeniable that there was a "change in control" of the "controlling block" of 47.6% IDS stock owned by Alleghany.

> "* * * Congress intended the Investment Advisers Act of 1940 to be construed like other securities legislation 'enacted for the purpose of avoiding frauds', not technically and restrictively, but rather flexibly to effectuate its remedial purposes." *S.E.C.* v. *Capital Gains Research Bureau, Inc.*; (1964) 84 S. Ct. 275, 284-285, reversing 306 F. 2d 606 (2 Cir. 1963). (Emphasis supplied).

The second sentence of Section 2(a)(9) makes clear the lower Court's erroneous reasoning and shows that the Murchisons' $32,000,000 Alleghany stock purchases excluded their transactions from the "sole" exception specified by Congress to a statutory "transfer" of "control or management".

At no point does the Act exclude from the operation of the "assignment" sections a "transfer" of "control or management" achieved by a combination of stock purchases and proxy solicitations, but on the contrary it makes clear that such a transfer is within its scope. Thus Section 2(a)(9) is explicit as to the subject of the "transfer" intended by the Act to be within the scope of Section 1(b)(6): it is "Control" which "means the power to exercise a controlling influence over the management or policies of a company . . ." The *single* exception stated by Congress is "unless such power is *solely* the result of an official position with the company." Here the "transfer of control" was

* The Court below in its summary of legislative history totally omitted mention of or reference to any of the quotations therefrom set forth in this petition.

achieved not "solely" by the transfer of official positions but by some $32,000,000 or more of Murchison stock purchases for some 29% of the stock directly through the partnership of Murchison Brothers and their controlled companies. In addition they admittedly expended some $500,000 for proxy solicitation (44a) and made in connection therewith the typically fulsome promises of proxy contestants. Thus the principle "*expressio unius est exclusio alterius*" applies.

The basic error of the Court below.

At no point did the Court below consider the significance of the exception in Section 2(a)(9). The S.E.C. Report —which is the *sole* evidence of legislative intention upon which the Court below relied, instead of the Senate record and the Senate Report above quoted—merely listed obnoxious illustrations of transfer of control without consent. At no point and none is cited by the Court below does the report or the legislative history state these illustrations limit the Congressional intention. Congress by use of its language in Section 1(b)(6) and the "sole" exception thereto stated in Section 2(a)(9) obviously intended to slam the door against any other method of transferring control or management without consent.

This Court stated in *Rayonier Incorporated* v. *United States*, 352 U.S. 317: "There is no justification for this Court to read exemptions into the (Tort Claim) Act beyond those provided by Congress." (p. 320). The decision here indulges in such prohibited expansion.

The second clause of Section 2(a)(4) also supports this construction. Thus it excludes as an "assignment" a transfer of "a minority interest" in "a contract" or in "a controlling block" where a partner dies or withdraws and the other partners continue to hold the majority interest in the

contract or block. Under the doctrine *expressio unius est exclusio alterius*, this is the clearest kind of indication that Congress only intended to exclude from an "assignment" a transfer of "a minority interest" *by a partnership* as distinct from corporate stockholders; and that, apart from partnerships, a transfer of "a minority interest" so substantial as the $32,000,000 worth or 29% of Alleghany common stock owning a beneficial interest in the 47.6% IDS "controlling block", would be an "assignment". *A fortiori*, when that transfer is supplemented by proxies for another 22% plus acquisition of actual control over the "controlling block" plus acquisition of 8 out of 10 or a majority of the IDS board seats plus Chairman of the Board and other offices of IDS (pp. 7-8, *supra*) there can be no legitimate doubt that Congress intended such facts to constitute an "assignment".

The unqualified sweep of Section 1(b)(6), condemning all transfers of "control or management" without exception, removes any lingering doubt on this subject:

> "The description of assignment—upon which termination depends—in section 2(a)(4) as 'includ-[ing]' direct or indirect transfer of the contract or the transfer of a controlling block of shares of the manager should not be read as exclusive. The criteria for assignment are properly predicated upon the policy statement of section 1(b)(6), which is written in broad language, co-extensive with the dangers perceived by Congress, and requires liberal interpretation.[78] Whenever control of a manager

[78] See Brown *v.* Bullock, 294 F. 2d 415, 421 (2d Cir. 1961). The determination of the general purpose of a statute is a primary consideration in its construction, United States *v.* Whitridge, 197 U.S. 135, 143 (1905), and such purpose is often indicated in the preamble to a remedial enactment. Home Bldg. & Loan Ass'n *v.* Blaisdell, 290 U.S. 398, 420 (1933). See LLEWELLYN, THE COMMON LAW TRADITION—DECIDING APPEALS 524 (1960).

undergoes a substantial and ascertainable change, termination ought to be automatic.

"If this analysis is correct, a court must determine in each case where the locus of control was before the event in question and whether that event caused control to be transferred.

Termination of Management Contracts under the Investment Company Act of 1940, 63 Columbia Law Review 733, 744 (April, 1963).

Furthermore, the "assignment" provisions "evidence the concern of Congress with all forms of financial manipulations that would shift the locus of managerial responsibility without the assent of the investment company's shareholders":

"The concept of corporate control, described as 'the most important single fact'[79] in the American corporate system, may be defined in terms of the power to make important decisions—to select the board of directors, to influence and possibly dominate the board, and to engage in essentially unchecked corporate management.[80]

* * * * * *

"A final feature of transfer of control may be mentioned. It is surely apparent that if control in a parent corporation is transferred, such a transaction would also constitute a transfer of control of its subsidiaries. Thus, if the Alleghany proxy fight resulted in a transfer of control of that corporation

"[79] Berle, *'Control' in Corporate Law*, 58 COLUM. L. REV. 1212 (1958).

"[80] See 13 FLETCHER, CYCLOPEDIA OF THE LAW OF PRIVATE CORPORATIONS §5783 (rev. vol. 1961). Professor Berle suggests that corporate control must be discussed in terms of 'power' to control rather than the more traditional concept of property ownership. Berle, *supra* note 79, at 1215.

to the Murchisons, then control of IDS—a corporation controlled by Alleghany—was also transferred. In the Alleghany fight, there was little doubt about this effect.

"VI. Conclusion

The proper interpretation of the termination provisions of the Investment Company Act must, in the final analysis, depend on the function they were intended to serve. It is abundantly clear that these provisions were not directed solely to direct contract assignments and sales of stock of managers. Rather, the provisions evidence the concern of Congress with all forms of financial manipulations that would shift the locus of managerial responsibility without the assent of the investment company's shareholders. If these provisions are to be truly effectual, the courts must take it upon themselves to determine in each case whether such a shift has taken place. This is accomplished by an investigation as to the locus of control of the manager and whether a particular transaction has resulted in its transfer to new interests. Nothing in the act prevents the courts from making this sort of investigation; nor is it more difficult than other determinations courts are often asked to make. Only by such a creative role in carrying out the purposes of the termination provisions can the courts truly protect the interests of investment company participants." (Emphasis supplied.) (63 *Columbia Law Review* at pp. 747-748).

II.

The construction of the Act by the Court below mistakes the "remedial purpose" of the Act and "the mischief and defect" aimed at by Congress.

The only places the word "transfer" is used in the Act are Sections 1(b)(6) and 2(a)(4). It thus must include the same meaning in both places and be interrelated, since no other section of the Act uses the word. Thus to reject petitioners' construction that the first section expands the meaning of the second is to shrink the intended Congressional scope. These considerations make clear that "transfer . . . of a controlling block" includes the meaning of "transfer of the control or management of a controlling block." Otherwise the Congress is put in the position of discriminating between "good" and "bad" methods of transferring control or management without the consent of the security holders. It is the transfer without consent that is the evil aimed at, not the particular method used in transferring without consent. Such a false distinction is equivalent to saying that government without consent of the governed is "in the national public interest and that of investors" if it is achieved by one method and not by another.

III.

The decision herein of the Court of Appeals for the Second Circuit creates a "loophole" in the Declaration of Policy in Section 1(b)(6), pursuant to which Congress directed that the Investment Company Act of 1940 "shall be interpreted", in conflict with the "no loophole" construction of the Court of Appeals for the Ninth Circuit in S. E. C. v. Insurance Securities, Inc., 254 F. 2d 642, cert. denied, 358 U.S. 823 (1958), and the Senate and House reports.

The Court below sought to distinguish the decision in the Ninth Circuit by stating:

> "They (appellants) say rather that the transfer of the Young shares, *plus* the purchase of other shares, *plus* the grant of proxies by the majority of the 'free' stock, assuring the subsequent Murchison victory and the attendant change in Alleghany's board, constituted the assignment. * * * But the provision speaking of the 'transfer . . . of a controlling block' contemplates that such a block exist and be transferred and not merely that purchases of large and small amounts eventually bring the controlling interest into one pair of hands. We recognize that a coordinated transfer by several associates sharing the controlling interest among them may meet the definition, compare *SEC* v. *Insurance Sec., Inc.*, 254 F. 2d 642 (9 Cir.), cert. denied, 358 U. S. 823 (1958)." (Appendix B, B-11)

Thus the Court below held against petitioners' position because they had not shown a transfer of two "controlling blocks" instead of only one as required by Sections 1(b)(6) and 2(a)(4). All that is required by reading these sections together ("text in the light of context", *S.E.C.* v. *Joiner*

Corp., 320 U.S. 344, 351) is a "transfer" of "the control or management" of "a controlling block," here the *existing* 47.6% block of 1108 voting securities, by "a security holder" (Alleghany) acting under the legal compulsion of the Murchisons as stockholders and proxy holders. It is immaterial that the transfer of the "control or management" of this 47.6% block was not achieved by the transfer also of "a controlling block" of Alleghany's own stock by "a coordinated transfer by several associates sharing the controlling interest". Yet that is precisely what happened here, although it occurred at the holding company level instead of as in *Insurance Securities* at the level of the advisory company itself. The S.E.C. in its 4 to 1 vote agreeing with petitioners' construction herein endorsed the position of its Division of Corporate Regulation which administers the Act "that no distinction was intended by Congress by the effect of a transfer of control through exercise of the power to sell a security or the exercise of the power to vote a security, since both are incidents of ownership." (pp. 9-10, *supra*).

As this Court stated in construing a similar public interest statute, the Public Utility Holding Company Act of 1935:

> "That they (defendants) conduct such (service contract) transactions through the instrumentality of subsidiaries cannot avail to remove them from the reach of the federal power. It is the substance of what they do, and not the form in which they clothe their transactions, which must afford the test. The constitutional authority confided to Congress could not be maintained if it were deemed to depend upon the mere modal arrangements of those seeking to escape its exercise. Compare Northern Securities Co. v. United States, 193 U. S. 197." *Electric Bond & Share Co.* v. *S.E.C.*, 303 U. S. 419, 440. (Emphasis supplied).

In *S.E.C.* v. *Insurance Securities, Inc.*, 254 F. 2d 642, the Court stated that the investment company "had no officers or directors of its own." (p. 645)* The trustee there did what Mutual's directors did here, enter into investment advisory and underwriting contracts so that "Management functions were discharged by the service company as sponsor and investment adviser." (Id.) In *Insurance Securities, supra*, the same service company continued to service the fund, after the transactions in question, as did IDS here. There was no transfer to another service company there and there was none here. In both cases only the controlling persons of the two service companies changed identity. But in the first the Court of Appeals said the result was an "assignment". The same result may not be avoided here because the "mere modal arrangements of those seeking to escape" the statute's "assignment" section took a different "form".

The Ninth Circuit's decision likewise makes clear that the form of the transaction changing the control of the investment adviser was immaterial:

> "Section 1(b) of the act, 15 U. S. C. A. §80a—1(b), contains a factual recital to the effect that the national public interest and the interest of investors are adversely affected when any one of eight described conditions exist. The only one of these described circumstances which is relevant to the first cause of action is that which is set out in subdivision (6) of this section. * * *
>
> The circumstance which is objectionable under this statutory pronouncement is transfer of control without consent, however achieved and whatever

* Investors Mutual also has no full-time officers or management of its own. (3d-7d) Five of its six officers are full time officers of IDS. (Id.)

the consideration therefor." (254 F. 2d at 648-9) (Emphasis supplied).

* * * * * *

"Nor do we find anything of consequence in the legislative history of the act which would support such a conclusion. The pertinent problem with which Congress was asked to deal was * * * the transfer of control of investment advisers exercising management functions, or their assignment of the service contract to others, without the consent of the investors [by statutory vote], regardless of the consideration received therefor. Congress recognized this problem in §1(b) of the act, and provided a specific remedy in §15(a)(4)." (p. 650). (Emphasis supplied).

In note 13, the Court of Appeals for the Ninth Circuit stated:

"13. Neither the report of the Senate Committee on Banking and Currency on S. 4108 (Report No. 1775, 76th Cong., 3d Session) nor the report of the House Committee on Interstate and Foreign Commerce on H. R. 10065 (Report No. 2639, 76th Cong., 3d Session) comments on any problem in connection with the assignment of service contracts except the lack of prior knowledge or consent of investors. . ." (254 F. 2d at 650). (Emphasis supplied).

In conflict with the "however achieved" construction of the Ninth Circuit and the Congressional reports, the decision below modifies the Congressional declaration of Policy in Section 1, sub-paragraph (b)(6) to include the following underlined exception:

"Sec. 1. * * * (b) * * * it is hereby declared that the national public interest and the interest of investors are adversely affected——

(6) when investment companies are reorganized * * * or when the control or management thereof is

> transferred, without the consent of their security holders; except when transfer of the control or management of a holding company controlling the investment adviser and underwriter which controls or manages the investment company is achieved by a combination of stock purchases and proxy solicitations."

Had Congress intended to make such an exception it would not have condemned as did the Senate Report on the Act with respect to "Management Investment Companies" the transactions which

> "By various devices of control, such as * * * control of the proxy machinery, and pyramiding of companies, public investors are effectively denied, in many instances, any real participation in the management of their companies." Senate Report 1775, 76th Cong., 3rd Sess. (1940), p. 7. (Emphasis supplied.)

Nor would the expert "*Study of Mutual Funds*" prepared for the S. E. C. by the Wharton School of Finance & Commerce and made a "*Report of the Committee on Interstate and Foreign Commerce*" (87th Cong., 2d Sess., 1962, House Report No. 2274), have stated with respect to "open-end" Mutual Companies (the statutory classification of Investors Mutual):

> "* * * In most instances a majority of members of the board of directors of open-end companies were not affiliated with the adviser. However, the active management of open-end investment companies is generally in the hands of one or a few principal officers of the company, or has been delegated explicitly to the investment adviser. This pervasive interpenetration of executive personnel, taken in conjunction with the fact that open-end companies are almost invariably organized by a management group associated with the adviser, and the present limita-

tions on the role of independent directors, suggests that open-end investment companies are typically legal shells without genuine autonomy, controlled by external management interests.'' (p. 67) (Emphasis supplied.)

Certainly Congress did not intend to exempt in ''the national public interest and the interest of investors'' from the scope of Section 1(b) (6) a conquest of control of a $3 billion investment company system such as that of the Alleghany-IDS system achieved through the condemned method of ''pyramiding'' over ''legal shells without genuine autonomy'' and ''controlled by external management interests'' contrary to the very basis set forth in the Section 1 ''Findings and Declaration of Policy'' of The Investment Company Act of 1940.

Conclusion.

For the foregoing reasons this Petition for Writ of Certiorari should be granted.

Dated May 10, 1965

Respectfully submitted by

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APPENDIX "A"

The Statute.

The Investment Company Act of 1940, Public—No. 768—76th Congress, Chapter 686—3rd Sess., H. R. 10065 (15 U. S. C. §80a, *et seq.*) provides, in pertinent part as follows:

Findings and Declaration of Policy.

SEC. 1. * * * *

"(b) * * * it is hereby declared that the national public interest and the interest of investors are *adversely affected*—

* * * * * * *

(4) when the control of investment companies is unduly concentrated through *pyramiding* or *inequitable* methods of control, or is *inequitably distributed*; . . .

* * * * * * *

(6) when investment companies are reorganized * * * or *when the control or management thereof is transferred, without the consent of their security holders*; * * *

* * * * * * *

It is hereby declared that the policy and purposes of this title, *in accordance with which the provisions of this title shall be interpreted*, are to mitigate and, so far as is feasible, *to eliminate the conditions enumerated in this section* which adversely affect the national public interest and the interest in investors."

General Definitions.

Section 2(a)(4) states:

"'Assignment' *includes any direct or indirect* transfer * * * of a contract * * * or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor;"

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"(b) * * * it is hereby declared that the national public interest and the interest of investors are adversely affected—

* * * * * *

(4) when the control of investment companies is unduly concentrated through *pyramiding* or *inequitable* methods of control, or is *inequitably distributed* . . .

* * * * * *

(6) when investment companies are reorganized * * * or *when the control or management thereof is transferred, without the consent of their security holders;*

* * * * * *

It is hereby declared that the policy and purposes of this title, *in accordance with which the provisions of this title shall be interpreted, are* to mitigate and, so far as is feasible, *to eliminate the conditions enumerated in this section* which adversely affect the national public interest and the interest in investors."

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SECTION 2(a)(4) states:

" 'Assignment' *includes* any *direct or indirect* transfer * * * of a contract * * * or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor;"

SECTION 2(a)(9) states:

"'Control' means the power to exercise a controlling influence *over the management or policies of a company,* unless such power is solely the result of an official position with the Company.

"Any person who owns beneficially, either directly or *through one or more controlled companies,* more than 25 per centum of the voting securities of a company shall be presumed to control such a company. * * * Any such presumption may be rebutted by evidence, but except as hereinafter provided, *shall continue until a determination to the contrary made by the Commission by order* either on its own motion or on application by an interested person. * * *"

Investment Advisory and Underwriting Contracts.

SECTION 15(a) states:

"After one year from the effective date of this title it shall be unlawful for any person to serve or act as investment adviser of a registered investment company except pursuant to a written contract, which contract, whether with such registered company or with an investment adviser of such registered company * * * has been approved by the vote of a majority of the outstanding voting securities of such registered company and—

* * * * * *

(4) provides, in substance, for its automatic termination in the event of its assignment by the investment adviser."

SECTION 15(b)(2) states:

"(b) After one year from the effective date of this title, it shall be unlawful for any principal underwriter for a registered open-end company to offer for sale,

sell, or deliver after sale any security of which such company is the issuer, except pursuant to a written contract with such company, which contract * * *

* * * * * *

(2) provides, in substance, for its automatic termination in the event of its assignment by such underwriter."

SECTION 15 states:

* * * * * *

"(d) It shall be unlawful for any person—

(1) to serve or act as investment adviser of a registered investment company, pursuant to a written contract . . . after March 15, 1945, or the date of termination provided for in such contract, whichever is the prior date, or after assignment thereof subsequent to March 15, 1940, by the person acting as investment adviser thereunder; or

(2) as principal underwriter for a registered open-end investment company to offer for sale, sell, or deliver after sale any security of which such company is the issuer, pursuant to a written contract * * * after March 15, 1945, or the date of termination provided for in such contract, whichever is the prior date, or after assignment thereof subsequent to March 15, 1940, by the person acting as principal underwriter thereunder * * *"

Validity of Contracts.

SEC. 47. (a) Any condition, stipulation, or provision binding any person to waive compliance with any provision of this title or with any rule, regulation, or order thereunder shall be void.

(b) Every contract made in violation of any provision of this title or of any rule, regulation, or order

thereunder, and every contract heretofore or hereafter made, the performance of which involves the violation of, or the continuance of any relationship or practice in violation of, any provision of this title, or any rule, regulation, or order thereunder, shall be void (1) as regards the rights of any person who, in violation of any such provision, rule, regulation, or order, shall have made or engaged in the performance of any such contract, and (2) as regards the rights of any person who, not being a party to such contract, shall have acquired any right thereunder with actual knowledge of the facts by reason of which the making or performance of such contract was in violation of any such provision, rule, regulation, or order.

Liability of Controlling Persons; Preventing Compliance with Title.

SEC. 48. (a) It shall be unlawful for any person, directly or indirectly, to cause to be done any act or thing through or by means of any other person which it would be unlawful for such person to do under the provisions of this title or any rule, regulation, or order thereunder.

APPENDIX "B"

Opinion and Judgment of Court of Appeals.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 190—September Term, 1964.

(Argued December 1, 1964 Decided February 10, 1965.)

Docket No. 29126

ELSE WILLHEIM and RANDOLPH PHILLIPS,

Plaintiffs-Appellants,

—v.—

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners d/b/a MURCHISON BROTHERS, and INVESTORS DIVERSIFIED SERVICES, INC.,

Defendants-Appellees,

—and—

INVESTORS MUTUAL, INC.,

Defendant.

Before:

FRIENDLY and SMITH, *Circuit Judges,* and BLUMENFELD, *District Judge.**

Appeal by two stockholders of Investors Mutual, Inc. from a judgment of the District Court for the Southern District of New York, Archie O. Dawson, *Judge,* 231 F. Supp. 142 (1964), granting defendants' motions for sum-

* Sitting by designation.

mary judgment to dismiss their complaint, which alleged that Investors Diversified Services, Inc. had unlawfully continued to act as investment adviser and principal underwriter for Investors Mutual despite an assignment of such contracts, in violation of §15(d) of the Investment Company Act. Affirmed.

RANDOLPH PHILLIPS, New York, N. Y., *Appellant Pro Se.* (Leonard I. Schreiber, New York, N. Y., on brief for Appellant Else Willheim).

SAMUEL E. GATES (Debevoise, Plimpton, Lyons & Gates, New York, N. Y.; J. Asa Rountree, Robert J. Geniesse, J. Edward Fowler, of Counsel), *for Investors Diversified Services, Inc.*

STUART N. UPDIKE (Townley, Updike, Carter & Rodgers, New York, N. Y.; Lee W. Meyer, Peter G. Kelly, of Counsel), *for John D. Murchison and Clint W. Murchison, Jr.*

TAGGART WHIPPLE (Davis, Polk, Wardwell, Sunderland & Kiendl, New York, N. Y.), *for Investors Mutual, Inc.*

FRIENDLY, *Circuit Judge*:

The affairs of Alleghany Corporation, from its founding by the Van Sweringen brothers in 1929, have given rise to a flood of litigation that must be unparalleled in American corporation law. Even a single phase of its activity, its relationship with Investors Diversified Services, Inc. (IDS), of which Alleghany obtained control in 1949, has been a bounteous provider for the Securities and Exchange Commission and the courts, especially the District Court for the

Southern District of New York and this court. This appeal concerns a chapter of Alleghany ten years after the one that recently occupied our attention in *Alleghany Corp.* v. *Kirby*, 333 F. 2d 327 (2 Cir. 1964), court equally divided on rehearing *in banc*, —— F. 2d —— (1965); the present case concerns the dislodgment in 1961 of the Kirby management by its quondam ally, the Murchison brothers, and the effect of this on the contracts between IDS and one of the investment companies for which IDS acts as investment adviser and underwriter.

Alleghany bought a controlling interest in IDS in 1949; though its holdings have varied, it has held 47.6% of IDS's voting stock during the period in 1960 and 1961 here relevant. As of January 1, 1960, Allan P. Kirby and two corporations controlled by him owned 571,200 shares of Alleghany common stock and 143,210 shares of 6% preferred, each convertible into 4.7 shares of common on payment of $3.75 per common share. The next largest stockholding was that of Robert R. Young's widow, who individually and as executrix owned 250,717 shares of common and 160,320 shares of 6% convertible preferred. Kirby's nominees were elected as directors at the Alleghany annual meeting on May 2, 1960.

In September, 1960, the Murchison brothers, with two other Alleghany stockholders, organized a committee to elect a new board of directors at the annual meeting of stockholders on May 1, 1961. Earlier in 1960, they had contracted to acquire Mrs. Young's holdings, on which they immediately obtained the voting rights; as a result of the purchase of her common stock and the conversion of preferred stock acquired from her, they obtained 1,004,221 common shares.[1] Before the record date for the Alleghany

1 The initial contract, dated January 30, 1960, with the father of the Murchison brothers, provided for purchases on various dates beginning March 1, 1960, and ending August 31, 1962. The contract was assigned

annual meeting in 1961, they and their participants and associates had acquired by miscellaneous purchases of common stock (or by conversion of preferred stock or exercise of warrants similarly purchased) another 1,132,117 shares of common, and other members of their committee with participants and associates owned or had similarly acquired a further 717,632 common shares. These three items totaled 2,853,970 shares of the common stock. Meanwhile Kirby had been fighting fire with fire; on the record date he and the other participants and associates with him owned 3,303,289 shares of Alleghany common. 3,043,746 common shares represented at the 1961 meeting were not owned by either side.[2] Approximately 71% of these "free" shares were voted for the Murchison slate, which won by some 854,000 votes. The tellers certified the victory on May 23, 1961; on that day the newly chosen directors elected John D. Murchison as president and chief executive officer of Alleghany. At a special meeting of IDS stockholders on July 18, 1961, Alleghany caused the election of eight new directors while retaining two others as holdovers from the IDS board that Kirby had selected; the new IDS board was

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to the brothers on March 1, 1960. In accordance with a provision in the contract, a supplemental agreement, dated April 7, 1961, accelerated the schedule so that the shares not yet purchased were acquired that month.

2 In 1961 the Alleghany common was entitled to elect seven out of nine directors, the remaining two being elected by the convertible preferred. The ownership of the common shares as of the record date was as follows:

	Number	%
Kirby, his participants and associates	3,303,289	33.6
Murchisons' Committee, their participants and associates	2,853,970	29.0
Not owned by either group and represented at the meeting	3,043,746	30.9
Not owned by either group and not represented at the meeting	643,965	6.5
	9,844,970	100.0

under Murchison control and Clint W. Murchison, Jr. became chairman.

Sections 15(a) and (b) of the Investment Company Act of 1940 (15 U. S. C. §§80a-1 to -52), make it unlawful to act as investment adviser for a registered investment company or as principal underwriter for a registered open-end company except pursuant to a written contract, approved by a majority of the outstanding voting securities in the case of the investment adviser and by a disinterested majority of the directors in the case of the underwriter, which must provide, *inter alia*, "for its automatic termination in the event of its assignment" by the investment adviser or underwriter. In May, 1961, IDS was acting as investment adviser and as principal underwriter to Investors Mutual, Inc., an open-end company, under contracts with such termination provisions. Section 15(d) ties the knot by making it unlawful to act as investment adviser or principal underwriter under a written contract after assignment thereof. Finally, §2(a)(4) instructs us that:

> "(4) 'Assignment' includes any direct or indirect transfer or hypothecation of a contract or chose in action by the assignor, or of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor. . . ."

The gravamen of the complaint in the instant derivative action, brought by two stockholders of Investors Mutual in the District Court for the Southern District of New York, as authorized by §44 of the Act, is that IDS continued to act as investment adviser and principal underwriter for Investors Mutual although, allegedly, the events here recounted were an "assignment." The principal relief asked was an injunction preventing further performance of the

contracts allegedly terminated[3] and repayment to Investors Mutual of profits and damages that had accrued since the assignment. See, e.g., *Lutz* v. *Boas*, 39 Del. Ch. 585, 171 A. 2d 381 (1961). Contending that on the undisputed facts there was no assignment, IDS and the Murchisons made motions for summary judgment dismissing the complaint, which Judge Dawson granted, 231 F. Supp. 142 (1964). Although we consider the case closer than he did, we affirm.[4]

There is little dispute that certain of the possible forms of "assignment" listed in §2(a)(4) must be eliminated straight away. There was no "hypothecation of a contract or chose in action by the assignor." Likewise there was no "direct . . . transfer" of a contract; IDS made no attempt to substitute another as holder of its contracts for investment advisory and underwriting services with Investors Mutual. Neither was there a "direct . . . transfer . . . of a controlling block of the assignor's outstanding voting securities by a security holder of the assignor." In the context of §15 the "assignor" is the person rendering investment advisory or underwriting services—here IDS; and the "controlling block" of IDS has remained where it had been for over a decade—in Alleghany's treasury. The serious questions are whether there was an "indirect transfer," either of a "controlling block" or of the contracts themselves.

Since the statute requires transfer "of a controlling block of the assignor's outstanding voting securities *by a security holder of the assignor*," the absence of any transfer of IDS stock by Alleghany would thus, on a literal reading, be as complete an obstacle on the "indirect" as it is on the

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3 New contracts with IDS, approved by a majority of the outstanding voting stock of Investors Mutual, became effective April 6, 1963.

4 Our previous affirmance of Judge Dawson's denial of a temporary injunction, 303 F. 2d 276 (1962), affirming 203 F. Supp. 478 (1962), did not reach the merits. See Comment, Termination of Management Contracts under the Investment Company Act of 1940, 63 Colum. L. Rev. 733 (1963).

"direct" path. Yet this conclusion, it can well be argued, shows the need for avoiding such literalism in order to give some effect to the possibility, envisioned by the statute, of an "indirect" transfer of a controlling block by means such as there described. An answer might be that sufficient effect would be given by considering "indirect" to have been included to cover cases where a separate corporate layer was interposed, or some other device was used, in the absence of any significant business purpose, e.g., if ownership of IDS had been vested in a company created for the sole object of holding its stock, and a controlling block of stock in the holding company was transferred—a situation not contended to be present here, where Alleghany had existed long before its purchase of a controlling interest in IDS in 1949 and continued to have many other interests. We by no means reject this possible construction. Serious problems are created, particularly as regards stockholders having no connection with the transfer of a controlling block, if the Draconian sanctions of §15(d) are visited upon a company, having many other purposes, that has acquired a controlling interest in an investment adviser or underwriter. Although minority stockholders in a company of the latter sort are likely to be familiar with the Investment Company Act—or may fairly be treated as if they were, it is somewhat unrealistic to suggest that the public stockholders of Alleghany, who voted predominantly with the Murchisons in the proxy contest, were on notice that a Murchison victory might impair the value of the brightest jewel in Alleghany's crown, and consequently unfair to penalize them for having done so.

However, we shall here assume, *arguendo*, that the definition is broad enough to include the transfer of a controlling block of the voting securities of an owner of a controlling block of the assignor's voting securities by a security holder of that owner, even when the owner is not a

company created to hold the assignor's stock. In making that assumption we in no way accept appellants' further contention that whenever a group controlling Alleghany lost control to another group, this would inevitably constitute an indirect transfer of a controlling block of IDS by its security holders within the meaning of §2(a)(4). Shortly we will set down in another context our reasons for believing that Congress did not mean that the mere change in management or control of an investment adviser or underwriter was an "assignment" terminating its contract. While those reasons are equally applicable on the issue here considered, it is even more certain that Congress did not intend that such a change, occurring as the result of a proxy contest in a parent corporation controlling the adviser but without transfer of a controlling block of the parent's stock, could constitute an "indirect transfer . . . of a controlling block of the assignor's securities." If such a change took place through a similar proxy fight among the immediate owners of the adviser itself, no one could conclude that any "controlling block" had been transferred directly or otherwise, and it would be a contradiction to treat a transaction *more* harshly when it occurs in the company controlling the adviser than in the adviser itself. We stretch the word "indirectly" as far as permissible—if not indeed too far—when we treat the case as if Alleghany itself were the investment adviser. Hence we proceed to consider whether the transfer of a controlling block of Alleghany stock has been shown.

The only transaction in the present record that might constitute such a transfer would be Mrs. Young's sale of her stock to the Murchisons. Viewing the matter as of the first of January, 1960, the month in which she committed to sell and vest the Murchisons with voting rights, her stock, assuming complete conversion of her preferred shares, would have represented 1,004,221 common shares. At the same

time, on a similar assumption, Kirby would have had 1,244,287 common shares. The total outstanding common shares, giving effect to both assumed conversions, would have been 6,717,968. The Young stock would thus have been slightly less than 15% and the Kirby stock somewhat more than 18% of the total. If the figures of Young and Kirby ownership in January, 1960, are related to the 9,884,970 common shares outstanding on the record date in 1961 as a result of further conversions and the exercise of warrants—probably a more realistic test—the proportions are reduced to almost 11% for the Young stock and 13% for the Kirby stock.

Section 2(a)(9) of the Investment Company Act contains provisions as to "control" which we quote in the margin.[5] It is clear that Kirby and Young together had controlled Alleghany for twenty years, until Young's death in 1958, and it could hardly be doubted that a sale of their combined holdings would have been the transfer of a controlling block. Very likely a sale of Kirby's shares alone in 1960 would have been such a transfer even though these were considerably less than 25% of Alleghany's voting securities, for Kirby had nominated the Alleghany board and presumably could have procured their resignations in favor of a transferee. This dual transfer of the single largest block along with the board of directors and the

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5 "(9) 'Control' means the power to exercise a controlling influence over the management or policies of a company, unless such power is solely the result of an official position with such company.

"Any person who owns beneficially, either directly or through one or more controlled companies, more than 25 per centum of the voting securities of a company shall be presumed to control such company. Any person who does not so own more than 25 per centum of the voting securities of any company shall be presumed not to control such company. A natural person shall be presumed not to be a controlled person within the meaning of this subchapter. Any such presumption may be rebutted by evidence, but except as hereinafter provided, shall continue until a determination to the contrary made by the Commission by order either on its own motion or on application by an interested person. . . ."

important corporate proxy machinery could reasonably be said to overcome the negative presumption of §2(a)(9) that less than 25% ownership does not control.[6] But is the same true of the block held by Mrs. Young?

In giving a negative answer we do not underestimate the strategic character of the Young holdings. So far as the record shows, these were by far the largest block of Alleghany common shares save for the Kirby holdings, and those were only slightly larger if the Young preferred was converted, as it was likely to be in a contest for control since the preferred was selling at a price reflecting the price of the common. It must have been, and quite obviously was, apparent to the Murchisons that the first step in a successful bid to oust the Kirby management was to prevent any possibility of Kirby's getting the vote of the Young stock by putting this securely in their own corner. The correctness of this judgment is shown by the fact that, even after all the stock buying and the vote of 71% of the "free" stock for the Murchisons, the margin of victory was less than the stock purchased from Mrs. Young.

The concept of control is relevant to a number of provisions in the Investment Company Act and has been examined by the SEC in more than one decision. E.g., *M. A. Hanna Co.*, 10 S. E. C. 581 (1941); *Transit Inv. Co.*, 23 S. E. C. 415 (1946); *Chicago Corp.*, 28 S. E. C. 463 (1948). However, in construing the variant term "controlling block," the emphasis must be on transferable elements of power and due attention must be given to the precise regulatory provision invoked. Obviously, management will give an attentive hearing to any sizable stockholder and a single

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6 We here follow the SEC, Fundamental Investors, Inc., SEC Investment Co. Act, Release No. 3596 (Dec. 27, 1962), in assuming that a court, as well as the SEC, may determine that the presumption of §2(a)(9) has been overcome, and may do so without preliminary resort to the administrative agency.

share may prove decisive in an even contest; but where the amount is less than 25% and has no other indicia of control, it is not a "controlling block" unless ownership itself fairly presages victory. In the present case, Mrs. Young's block was not the single rallying point for an otherwise widely scattered ownership but was somewhat smaller than the Kirby holdings against which it would be pitted in a contest. More important, it was the Kirby block that was tied to the directorships and the proxy machinery. It is impossible in these circumstances to overcome the negative presumption of §2(a)(9) that a block smaller than 25% does not control; especially is this so in the context of §15 where Congress must have recognized the importance of clearly alerting the adviser or underwriter that a specific transfer of stock required immediate action to obtain renewal of contracts.

Indeed, appellants do not seriously urge that IDS' contracts with Investors Mutual were assigned by the Murchisons' acquisition of purchase and voting rights in the Young stock early in 1960 or even by the outright transfer of the stock itself in April, 1961, standing alone. They say rather that the transfer of the Young shares, *plus* the purchase of other shares, *plus* the grant of proxies by the majority of the "free" stock, assuring the subsequent Murchison victory and the attendant change in Alleghany's board, constituted the assignment. We will shortly consider whether all this amounted to an "indirect transfer . . . of a contract." But the provision speaking of the "transfer . . . of a controlling block" contemplates that such a block exist and be transferred and not merely that purchases of large and small amounts eventually bring the controlling interest into one pair of hands. We recognize that a coordinated transfer by several associates sharing the controlling interest among them may meet the definition, compare *SEC* v. *Insurance Sec., Inc.*, 254 F. 2d 642 (9 Cir.), cert. denied,

358 U. S. 823 (1958). Yet by no stretch of the statutory language can the block sold by Mrs. Young be swelled by the unrelated sales to the Murchisons by numberless other sellers, let alone by the revocable proxies given by those who never sold their stock at all.[7] What Mrs. Young had was not a "controlling block" but a block enormously valuable and even necessary for a successful challenge to Kirby's control. Whether or not this might be control in some other context, it is not enough to make her stock a "controlling block" for purposes of §2(a)(9) and the attendant consequences under §15.

It is with this background that we approach the other branch of the definition and the contention that the Alleghany proxy fight successfully conducted by the Murchisons worked an "indirect transfer" of the contracts between IDS and Investors Mutual. Appellants properly stress the direction, in §1 of the Investment Company Act, that its provisions shall be interpreted so as "to mitigate and, so far as is feasible, to eliminate the conditions enumerated in this section which adversely affect the national public interest and the interest of investors," one of which, §1(b)(6), is "when the control or management . . . [of investment companies] is transferred, without the consent of their security holders." In a colloquial sense it may be true that the result of the Alleghany proxy contest "transferred" the "management" not merely of IDS but also of an investment company, to wit, Investors Mutual, without the consent of the latter's stockholders, and, correspondingly, appellants would have us read the terms "indirect transfer . . . of a

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7 Appellants contend that had discovery and trial taken place, proof that the Murchisons controlled a still larger number of shares (through unrevealed associates and friendly brokers) than those shown in fn. 2 might have been forthcoming. However, at no point have appellants suggested that there occurred any significant transfer of stock from the original Kirby-Young group to the Murchison block apart from the sale by Mrs. Young.

contract" in §2(a)(4) to extend to every change of "control or management" of an investment adviser. But we find it hard to read so broadly terms that Congress appears to have chosen with care, especially when nothing could have been simpler than to specify that any change of "control or management" of an adviser constituted a transfer. We surely should not do this without firm evidence that Congress considered events like the Alleghany proxy contest as abuses to be remedied by the automatic termination provisions.

The legislative history makes rather clear that the abuses under reference in §1(b)(6) were voluntary transfers of control and not dislodgments through proxy contests. The worst abuse, and one which the language of §1(b)(6) precisely fits, had been a sale by controlling stockholders of the investment company itself. The current dominance of the investment company field by open-end companies may prove misleading as to the meaning of the 1940 legislation. In 1936, the last year for which figures are given in the pertinent section of the SEC's Report on Investment Trusts and Investment Companies (1938-42), which led to the Investment Company Act, 68.2% of the industry's funds were held by incorporated closed-end companies, and the proportion had been as high as 92% in 1929, 2 *id.* 125-26. Many of these companies were highly leveraged, and because of the disfavor into which they had fallen after the 1929 crash, their shares were selling at discounts from the market value of the underlying assets. Sponsors of the funds owning the control stock would seek exits by selling at a premium to unscrupulous buyers who, after seating new directors as a result of seriatim resignations, would reimburse themselves for the purchase price by exchanging worthless securities for marketable ones in the company's portfolio. Notorious examples were the sales of controlling stock in and the subsequent looting of In-

suranshares Corporation and Reynolds Investing Corporation, see *Insuranshares Corp.* v. *Northern Fiscal Corp.*, 35 F. Supp. 22 (E. D. Pa. 1940), and *Gerdes* v. *Reynolds*, 28 N. Y. S. 2d 622 (Sup. Ct. 1941). The remedy for this abuse was not §15(d) but the disqualification of certain persons from serving as officers and directors of a fund, §9, the important ban against blanket replacement of boards, §16(a), the bar on certain kinds of self-dealing, §17, and similar provisions directly concerned with the investment company itself. Open-end companies had offered opportunities for seizing control by the purchase of management contracts, usually held by privately held corporations or partnerships organized by the founders of the fund, or of these companies themselves.[8] The SEC Report lists instances of the sale of the management contract or of the stock of the management company or of the assets of the partnership—acts clearly constituting "assignments"—followed by resignations and replacement of the directors of the fund. Transactions of these sorts appear to be what Congress had in mind and all that it described in §1(b)(6) even on a liberal reading. We have not been shown the slightest evidence that it gave any thought to the effect on investment advisory or underwriting contracts of a proxy contest in a publicly held adviser or underwriter—still less of such a contest in a publicly held multi-purpose company controlling the adviser or underwriter. While this history would give no sufficient reason for cutting down the words that Congress used, it does afford ground for refusing to expand them.

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8 Because the need for capital has been small, this close control is still fairly typical, although the number of secondary offerings of the stock of advisory companies and affiliated underwriters has been increasing recently. A Study of Mutual Funds, H. Rep. No. 2274, 87th Cong., 2d Sess. 452-65 (1962) (prepared for the SEC by the Wharton School of the University of Pennsylvania).

Two other considerations reinforce this conclusion. The first is that §15(d) is only one of many road-blocks set up to avoid the evils summarized in §1(b)(6). We have already referred to some. Additionally §13 prohibits certain significant changes in the policy of an investment company save by shareholder vote, §15(a)(2) demands, after two years, annual approval of advisory contracts by the directors or the shareholders, and §15(a)(3) requires a contractual provision for termination at any time, on 60 days' notice, at the instance of the board of directors or the shareholders. These provisions must be read along with §10, designed to provide some independence in the board of directors, and with what we have said as to the nature of the duty of all directors in passing on annual renewals, *Brown* v. *Bullock*, 294 F. 2d 415, 420 (2 Cir. 1961). Section 18 is directed at undue leverage in closed-end companies, and §20 regulates the soliciting of proxies from investment company shareholders. This battery of protective provisions designed "to mitigate and, so far as is feasible, to eliminate the conditions enumerated" in §1(b), weakens the case for giving an unusual construction to any one; Congress may have been relying on some other clearly applicable provisions to deal with a particular problem.

The other consideration is that a proxy contest, especially one conducted under §14 of the Securities Exchange Act, 15 U. S. C. §78n, has few of the characteristics of the transactions with which Congress was concerned, whereas stretching the concept of transfer of an investment advisory or underwriting contract to include cases where control of the adviser or underwriter was altered by such a contest without a transfer of "a controlling block" would contravene other policies. The transfers over which Congress was concerned had been conducted by a few sellers and a buyer, usually in secret; the minority stockholders of closed-end and the investors in open-end companies would

not even know of them until the looting was over. A proxy contest governed by §14 of the Securities Exchange Act receives much publicity—in this instance a glare of it; indeed, the contest in Alleghany was expressly called to the attention of Investors Mutual's shareholders in proxy material for their annual meeting on April 5, 1961, where they rejected resolutions for termination of the contracts with IDS. After conclusion of the contest there was a continuing opportunity to Investors Mutual to terminate the contracts without penalty upon 60 days' notice. As against this, adoption of the principle urged by appellants would strengthen the position of an incumbent management of a publicly held investment adviser or underwriter, or of a company controlling one, and, because of the threat of termination,[9] would restrict the free exercise of the franchise by the stockholders. It is true that the Alleghany proxy contest, featured by enormous stock purchases by both sides, was scarcely an example of Athenian or New England democracy. But 71% of the "free" stock voted for the challengers and Congress has not seen fit to put a penalty on such purchases, even in investment advisers or underwriters, save when a controlling block is transferred.

Appellants argue finally that since §2(a)(4) in defining "assignment" uses the verb "includes" rather than "is," the failure of a transaction to come within its terms does not necessarily mean that an assignment has not occurred. Although the proposition is true enough, it does not assist appellants. Definitions in securities and other legislation often use the word "include" out of abundant caution, and this serves a clear purpose when one or more of the things stated as included would not be so in the ordinary meaning

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9 It is not a sufficient answer to say that renewal by shareholder vote is usually easy to procure. No one could be sure of this, and it is doubtful whether the SEC would, or properly could, permit any prophecies to be included in proxy material.

of the term defined—as, here, the transfer of a controlling block. But that does not afford *carte blanche* to "include" transactions, neither expressly mentioned nor within the normal meaning of the language, simply because a court may think this a good idea. The Investment Company Act, the product of joint effort and compromise by the SEC and the industry, was drafted with a good deal of specificity; a court should give it a hospitable reception but ought not expand its words beyond their natural meaning to bring within its sweep a transaction, such as that here at issue, which is not the "mischief and defect" aimed at by the Act and which it is doubtful that Congress would have wished to include if it had considered the problem. Compare *Blau* v. *Lehman*, 368 U. S. 403 (1962).

Affirmed.

Judgment.

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the tenth day of February one thousand nine hundred and sixty-five.

Present:

HON. HENRY J. FRIENDLY,
HON. J. JOSEPH SMITH,

Circuit Judges,

HON. M. JOSEPH BLUMENFELD,

District Judge.

ELSIE WILLHEIM and RANDOLPH PHILLIPS,

Plaintiffs-Appellants,

—v.—

JOHN D. MURCHISON and CLINT W. MURCHISON, JR., co-partners, doing business as MURCHISON BROTHERS, INVESTORS DIVERSIFIED SERVICES, INC., and INVESTORS MUTUAL INC.,

Defendants-Appellees.

Appeal from the United States District Court for the Southern District of New York.

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellees.

A. DANIEL FUSARO
Clerk